

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.776 OF 1987**

The State of Maharashtra

... Appellant
(Orig. Complainant)

Versus

1. **Sopan Karbhari Rajole**
r/o.Kalyan, Dist. Thane.
 2. **Bhaskar Shamrao Patil**
r/o.Kalyan, Dist. Thane.
 3. **Arjun Babulal Patil**
r/o.Kalyan, Dist. Thane.
 4. **Chandu Karbhari Rajole**
r/o. Roze, Tal. Malegaon,
Dist. Nashik.
 5. **Murlidhar Ganpat Rajole**
r/o. Roze, Tal. Malegaon,
Dist. Nashik.
 6. **Bhausahab Bhaguji Chaudhari**
r/o.Kalyan, Dist. Thane
- ... Respondents
(Orig.Accd. Nos.1 to 6)

Mr. P.S. Hingorani, APP for the Appellant
None present for the Respondents.

**CORAM : S.B. MHASE,
& S.R. SATHE, JJ.
DATED : 16th SEPTEMBER, 2005**

ORAL JUDGEMENT :- (PER S.R. SATHE, J.)

1. The State of Maharashtra has preferred this appeal against the judgement and order passed by the Additional Sessions Judge, Nashik in Sessions Case No.

114/1985 whereby all the accused were acquitted of the offences punishable under sections 302, 324, 448 as well as offences punishable under sections 324, 326, 302, 448 r/w. Section 149 of Indian Penal Code.

2. The brief facts giving rise to this appeal are as under :-

Accused No.1 Sopan and accused No.4 Chandu are real brothers. Accused No.5 is their Bhauband. Accused Nos. 2,3 and 6 are friends of accused No.1 Sopan. Accused No.1 is resident of village Rose, Taluka Malegaon. Sonabai, step mother of accused No.1 entered into an agreement with complainant Pundlik Govinda Pawar on 24/12/1976 and agreed to sale her land to him. On the date of agreement, complainant Pundlik Govinda Pawar was put in possession of the said land. Since that date, he was cultivating the same. However, accused No.1 did not like the act of Sonabai of selling the land to a person out of the family. As a result of the same, Sonabai also avoided to execute Sale deed in favour of Pundlik. He, therefore, filed suit for specific performance of an agreement to sale. When the said suit was pending, Sonabai died and her daughters were brought on record as legal representative. Daughters also avoided to execute the sale deed.

Accused No.1 approached Pundlik and asked him to return the possession of the land after accepting some money over and above the earnest money paid by him to Sonabai. However, Pundlik was not ready for the same. Hence on the day of incident i.e. on 30/04/1985, accused called a meeting of elderly persons from the village at Piracha Par. Accused No.1 and complainant PW-6 Pundlik were present in the said meeting. Accused No.1 showed willingness to pay amount of Rs. 15,000/- to Pundlik. However, Pundlik refused to accept the same and return the land. According to the Prosecution, as a result of this, accused No.1 Sopan had a grudge against Pundlik.

3. On 30/04/1985, accused No.1 Sopan who was employed at Kalyan had come to Rose alongwith accused No.2,3 and 6. After the meeting was over, accused No.1 gave threat to Pundlik that he would teach a lesson to him. On that day, at about 8.00 pm complainant Pundlik Govinda Pawar and PW-7 Mahipat Pawar were taking meals by sitting on the Otta of their house. Wives of Pundlik and Mahipat and other family members were also present there. Pundlik's brother Vitthal i.e. deceased in the instant case was also sitting on a cot which was on the Otta.

4. It is alleged that at that time, accused Nos. 1 to 6 went there. Accused Nos. 1 and 4 were having axe with them and accused Nos. 2,3,5 and 6 were having sticks with them. After the time, accused reached there, accused No.1 Sopan gave two blows with an axe on the head of Pundlik. When he tried to get up, PW-7 Mahipat intervened and tried to rescue Pundlik but he also received an axe blow from accused No.4 Chandu. At that time, accused No.1 Sopan gave two more blows with an axe on the head of Pundlik. At that time, Hirabai tried to intervene but accused No.3 gave a stick blow to her. Accused Nos. 2,3,5 and 6 assaulted Vitthal with sticks. As a result of all this, Hirabai, wife of Pundlik so also Mahipat's wife raised hue and cry. Hearing the same, PW-8 Dattu Aute, PW-11 Kacharu Aute, PW-9 Murlidhar Ugale rushed towards the house of the complainant. Villagers also gathered but the accused ran away from the said place. It is alleged that before that the accused had also assaulted PW-8 Dattu Aute. Then all the injured persons namely PW-6 Pundlik Pawar, PW-7 Mahipat Pawar, PW-8 Dattu Aute, PW-5 Hirabai and Vithal were taken to village Dahiwad in bullock-cart and from there they were removed to Malegaon in S.T. Bus. On reaching Malegaon, they first went to the

Police Station. However, as the said persons had sustained serious injuries, they were sent to Wadia Hospital, Malegaon.

5. On the next day morning, PW-6 Pundlik Govinda Pawar filed FIR Exh-38. On the basis of the same, Police registered C.R. No.95/1985 against all the accused. As Vitthal succumbed to the injuries sustained by him, Police also registered an offence punishable under section 302 of IPC. After completion of the investigation, they submitted charge-sheet against accused in the Court of JMFC, Malegaon. Finding that accused were charge-sheeted for the offence punishable under section 302 of IPC which was exclusively triable by the Court of Sessions, accused were committed to the Sessions Court, Nashik.

6. Additional Sessions Judge, Nashik framed charge Exh-1 against all the accused for the offences mentioned earlier. All the accused pleaded not guilty and claimed to be tried. Their defence was of total denial. After considering the evidence adduced by the Prosecution, learned Additional Sessions Judge found that there was delay in filing FIR. Testimony of Prosecution witnesses namely PW-5 Hirabai, PW-6

Pundlik, PW-7 Mahipat, PW-8 Dattu, PW-11 Kacharu and PW-9 Muralidhar was not consistent. There were several inconsistencies in the story given by these witnesses. According to learned Trial Judge, names of the alleged eye witnesses were also not disclosed in the FIR. The injuries that were found on the person of injured person did not match with the allegations of assault that were made. No bloodstains were found on the axe with which Pundlik was assaulted. Considering all such infirmities in the evidence, the learned Trial Judge felt that the Prosecution has failed to prove the charges levelled against the accused and the accused are entitled for benefit of doubt. The learned Trial Judge, therefore, acquitted all the accused.

7. Being aggrieved by the said judgement and order State of Maharashtra has filed the present appeal.

8. In this appeal before us Mr. P.S. Hingorani, APP submitted that learned Trial Judge has not properly appreciated the evidence of the prosecution witnesses and has wrongly disbelieved the evidence with regard to identification parade. He, therefore, submitted that the appeal be allowed and the order of acquittal passed against accused be set aside and the accused be

convicted for the offences with which they were charged.

9. From the evidence on record, it is very clear that accused Nos. 1 and 4 are real brothers and accused No.5 is their Bhauband. Admittedly step mother of accused No.1 namely Sonabai has executed an agreement of sale a land on 24/12/1976 in favour of complainant PW-6 Pundlik Pawar and on that count, there was dispute between accused No.1 and 6. It is also not in dispute that accused Nos. 2,3 and 6 were in fact not known to the complainant prior to the incident and they are the friends of accused No.1. There is ample evidence on record to show that on the day of incident at night PW6 Pundlik, PW-7 Mahipat, deceased Vithal and PW-8 Dattu had sustained injuries and they were taken to Wadia Hospital Malegaon. It is also an admitted fact that Vithal succumbed to the injuries sustained by him and thereafter, postmortem was done by Dr. Sonkamble on the dead body of Vithal and he submitted Postmortem Report Exh-17. Taking into consideration the injuries sustained by Vithal and the evidence on Dr. Sonkamble it is clear that death of Vitthal is homicidal.

10. The main and material question is whether the

death of Vitthal is caused by accused Nos. 1 to 6 or by any one of them.

11. In order to prove the case, Prosecution is mainly relying on the testimonies of PW-5 Hirabai, PW-6 Pundlik, PW-7 Mahipat, PW-8 Dattu and PW-11 Kacharu and PW-9 Muralidhar. Admittedly except the last one namely PW-9 Muralidhar, the rest of the abovementioned witnesses are close relatives of each other. PW-8 Dattu and PW-11 Kacharu are the nephews of complainant PW-6 Pundlik. PW-5 Hirabai is the wife of PW-6 Pundlik. So taking into consideration their relations with the complainant and with the deceased, the evidence of these witnesses shall have to be scrutinized with great care and caution. So far as accused No.1,4 and 5, they were admittedly known to the Prosecution Witnesses prior to the incident in question. But so far as accused Nos. 2,3 and 6 are concerned, they were not known to the complainant prior to the incident. It must be borne in mind that the alleged incident has taken place at about 8.00 pm. Admittedly, there was no electric light or lantern lamp at the place where the alleged incident took place nor there is anything on record to indicate that there was sufficient light to identify the persons. So, while appreciating the

evidence of prosecution witnesses one must take into consideration this fact and see whether there was in fact sufficient opportunity to the Prosecution Witnesses to identify the assailants and in particular accused Nos. 2,3 and 6 who were admittedly not known to the prosecution witnesses prior to the incident.

12. At the outset it must be mentioned that the accused Nos.2,3 and 6 were not known to the complainant and other witnesses. At the relevant time, there was no sufficient light. So, there was in fact no proper opportunity for the said witnesses to observe the said unknown persons and then to identify them. What is more to be noted is that the abovementioned witnesses have not even given description of the said accused persons while giving evidence. Prosecution has examined the Executive Magistrate who had held the identification parade. However, Prosecution did not examine panchas for identification parade. No justifiable cause for non-examining panchas is given by the Prosecution. There is nothing to indicate that while holding identification parade the Executive Magistrate had taken care to select dummies of the age group of the assailants or having some resemblance in height, physique etc. From the evidence of Executive Magistrate, it is

in fact very clear that accused Nos.2,3 and 6 were seen by the witnesses when the said accused were in police custody. The evidence of Executive Magistrate in fact shows that he had not at all taken necessary care and precaution and had also not followed proper procedure while holding identification parade. The evidence in respect of identification of accused Nos. 2,3 and 6 by the other witnesses and the evidence of identification parade is rightly disbelieved by the learned Trial Judge. Even in the complaint, complainant Pundlik had only mentioned that besides accused Nos.1,4 and 5 there were other three unknown persons. He had also not given any description of the said unknown persons. So, we have absolutely no hesitation to hold that there is certainly no sufficient evidence to show that accused Nos. 2,3 and 6 were present at the relevant time at the place of offence and had taken part in alleged assault.

13. It must be noted that PW-5, PW-6 and PW-7 have stated that at the relevant time, accused No.1 Sopan assaulted PW-6 i.e. complainant with an axe on his head. Complainant has also stated that at the relevant time, other accused persons assaulted Vitthal as well as other witnesses namely Hirabai and Mahipat. However, when it is the case of the complainant that accused

came at the place of offence and immediately accused No.1 gave 3-4 blows with an axe on his head and he became unconscious, how reliance can be placed on his testimony when he says that thereafter accused assaulted Mahipat, Vitthal and Hirabai. Similarly, Pundlik as well as other witnesses have stated that at the relevant time, PW-8 Dattu Aute and PW-11 Kacharu Aute had come at the spot thereby suggesting that they have seen the incident. If such thing had happened then normally, complainant would have disclosed the names of the said alleged eye witnesses in the FIR Exh-38. That has not happened. So, we find that evidence with regard to presence of PW-8 Dattu Aute and PW-11 Jagannath Shinde as eye witnesses, appears to be doubtful. The learned Trial Judge has carefully scrutinized the evidence of PW-6 Pundlik, PW-5 Hirabai, PW-7 Mahipat in this behalf and has rightly arrived at the conclusion that there are several discrepancies and contradictions and inconsistencies in their statements. In fact, at one stage it has come on record that it is only after the time Hirabai raised hue and cry, other persons gathered there. Thereby suggesting that alleged act of assault was practically over at the relevant time. So, under such circumstances, if alleged eye witnesses have said that they have actually seen the accused Nos.1,4

and 5 while giving blows, the same can not be relied upon. The learned Trial Judge therefore rightly held that evidence of these witnesses is doubtful.

14. It is an admitted fact that from the place of offence police have attached only one axe and one knife without handle. Admittedly, no bloodstains were found on the axe. If really accused who had given blows with the said axe and Pundlik had sustained injuries as mentioned in the report then normally there would have been some bloodstains on the said axe. It has also come on record that it was not the case where free fight had taken place between assailants and the injured persons. So, under such circumstances, there was no reason why the knife without handle was found at the said place. It is pertinent to note that the complainant himself has in fact admitted in cross-examination that when they were taking meals at night on the Otta initially some persons came there, but he did not identify them. So, considering all these aspects, the learned Trial Judge has rightly held that evidence of injured witnesses as well as alleged eye witnesses is not reliable and as such benefit of doubt has to be given to the accused.

15. We also feel that the evidence on record is not free from doubt. The evidence of alleged eye witnesses is not worthy of credence. There is no sufficient explanation for lodging the FIR after about 15 hours. There is nothing to indicate that the Trial Court has not properly appreciated the evidence and the view taken by the learned Trial Judge is not a plausible view. When such is the position it is well settled that the view which is in favourable of the accused has to be accepted.

16. In this view of the matter, we are of the considered view that there is no substance in this appeal. Hence we pass the following order :-

O R D E R

Appeal is dismissed.

(S.R. SATHE, J.)

(S.B. MHASE, J.)